No. 78-316

In the Supreme Court of the United States

OCTOBER TERM, 1978

DANIEL RAMIREZ-URIARTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the jury was inadequately instructed as to the elements of the offenses.

After a jury trial in the United States District Court for the Southern District of California, petitioner and co-defendant Jose Uriarte were convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 960 and 963 (Count 1), and of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 2). Petitioner was sentenced to concurrent terms of five years' imprisonment on Count 1 and two years' imprisonment on Count 2, subject to the parole eligibility provisions of 18 U.S.C. 4205(b)(2). He was also sentenced to a special parole term of 15 years. The court of appeals affirmed (Pet. App.).

1. The evidence at trial showed that, sometime during September or October 1975, Arthur LaSalle, an unindicted co-conspirator, was asked by petitioner's co-defendant, Jose Uriarte, to drive a truck loaded with marijuana from Mexico to petitioner's residence in San Diego (Tr. 171-173, 179, 316-317). LaSalle did so and was paid $1,800 by Uriarte, who took delivery of the truck and its contents on the street near petitioner's house (Tr. 187-188). LaSalle transported truckloads of marijuana from Mexico on seven subsequent occasions between October 1975 and March 1976. On four of those occasions LaSalle delivered the trucks to petitioner at his residence (Tr. 198-199, 203-205, 208), and petitioner paid LaSalle between $1,000 and $2,500 for three of these deliveries (Tr. 199, 203, 208).[1]

2. Petitioner asserts (Pet. 8-12) that the trial court's instructions to the jury did not adequately describe the elements of the conspiracies charged because they did not define the terms "knowingly," "willfully," "importation," and "possession."[2] Since petitioner did not object to these instructions at trial, his claims do not warrant reversal of his conviction in the absence of plain error. Fed. R. Crim. P. 30, 52(b). As the court of appeals held, however, the jury was properly instructed in this case (Pet. App. 7).

The trial court instructed the jury that the essential elements of the conspiracy charged were as follows (Tr. 867):

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[1]After the third trip, LaSalle had been told by petitioner and another co-conspirator to cease making trips for Uriarte because Uriarte and his son had lost a truck carrying marijuana (Tr. 202-203). LaSalle made no further trips arranged or paid for by Uriarte.

[2]This argument is also raised by co-defendant Jose Uriarte, whose petition for a writ of certiorari is pending (No. 77-6916).

> Three essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment.
>
> First, that the conspiracy described in the indictment was willfully formed and was existing at or about the time alleged.
>
> Second, that the accused willfully became a member of the conspiracy.
>
> And third, that one of the conspirators thereafter knowingly committed an overt act charged in the indictment in furtherance of some object or purpose of the conspiracy at or about the time and place alleged.
>
> An overt act is any act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. It need not be criminal in nature if considered separate and apart from the conspiracy.

The jury was also instructed that one who acts in furtherance of a conspiracy must have knowledge of the scheme in order to be a co-conspirator (Tr. 868), that one becomes a willful participant if he understands the unlawful character of the plan and knowingly encourages or assists the scheme (Tr. 869), and that proof of specific intent is required in order to convict (Tr. 871). As to specific intent, the jury was instructed that "the government must prove that the defendant knowingly did an act which the law forbids purposely intending to violate the law" (Tr. 871).

Petitioner does not and could not successfully challenge the correctness of these specific instructions. See *United States* v. *Thompson*, 533 F. 2d 1006, 1009 (6th Cir.), cert.

denied, 429 U.S. 939 (1976); *Bradford* v. *United States*, 413 F. 2d 467, 470 (5th Cir. 1969); 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* §27.08 (3d ed. 1977). He claims only that the instructions should have been amplified. In the context of this case, however, any juror of ordinary intelligence would have understood the instructions to require him to find that petitioner knew that the object of the conspiracy was to knowingly import and intentionally possess marijuana with intent to distribute.[3] Moreover, two counts of the indictment—which was read to the jury twice (Tr. 55-57, 865-866)—specified that the object of the conspiracy was to "knowingly and intentionally import" and "knowingly and intentionally possess with intent to distribute" marijuana. Viewed in the context of the entire trial, *United States* v. *Park*, 421 U.S. 658, 674-675 (1975), the instructions to the jury adequately set forth the intent element of the offenses. See *United States* v. *Reyes-Padron*, 538 F. 2d 33, 35 (2d Cir. 1976), cert. denied, 429 U.S. 1046 (1977); *United States* v. *Papa*, 533 F. 2d 815, 825 (2d Cir.), cert. denied, 429 U.S. 961 (1976).[4]

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[3]Petitioner's reliance (Pet. 9-11) on cases such as *Morissette* v. *United States*, 342 U.S. 246, 274 (1952), and *United States* v. *DeMarco*, 488 F. 2d 828, 832 (2d Cir. 1973), is misplaced. Those cases concern a total omission of an instruction on scienter. Nor is *Screws* v. *United States*, 325 U.S. 91 (1945), upon which petitioner relies (Pet. 11), apposite. There the jury instructions included a fundamentally incorrect standard of willfulness.

[4]Petitioner's claim that the terms "importation" and "possession" should have been further defined in the jury instructions is without merit. Those terms are commonly understood and the jury could not have misapprehended their meaning.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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DOJ-1978-10